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No. 90-17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROTHERHOOD OF RAILWAY CARMEN
(DIVISION OF T.C.U.), *et al.*,
Petitioners,

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN *
DONALD F. GRIFFIN

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 - 17th Street, N.W., Suite 210
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners

* Counsel of Record

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REPLY BRIEF FOR PETITIONERS

In opposition to the petition, respondent Atchison Topeka & Santa Fe Ry Co. ("Santa Fe") asserts that the courts below properly held that a rail carrier's assertion that an implied agreement exists which arguably can be interpreted as waiving the statutory prohibition against carrier direct dealing with union-represented employees (45 U.S.C. §§ 152 Third, Fourth and Ninth) divests a district court of jurisdiction to enforce that prohibition. Brief in Opposition at 7-11, 23-25, *citing*, *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 105 L. Ed. 2d 250 (1989) ("*Conrail*"). *Santa Fe* further contends that the Unions' challenge to Santa Fe's implementation of a program which solicited employee resignations in return for their relinquishment of all rights under collective bargaining agreements, did not state a claim under the RLA. Brief in Opposition at 12-16. The petitioning rail labor unions (Unions") respectfully submit this brief in response to those contentions.

I. UNDER LONGSTANDING PRECEDENT OF THIS COURT, THE DISTRICT COURT HAD JURISDICTION OF THE UNIONS' CHALLENGE TO SANTA FE'S EMPLOYEE BUYOUT PROGRAM

Under both the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et al.*, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, this Court has held that the prohibition against employer direct dealing with union-represented employees is so fundamental to Federal labor policies that such conduct is necessarily violative of those statutes; and that, in RLA cases, district court enforcement of the prohibition against direct dealing is essential to the ability of employees to exercise the rights provided in the statute. *See Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship*

Clerks, 281 U.S. 548, 569 (1930); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937); *J.I. Case v. NLRB*, 321 U.S. 342 (1944); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944). Santa Fe has cited passages in several of these decisions as holding that "direct dealing of the type alleged in this case is permitted under the RLA." Brief in Opposition at 12. This contention is at odds with the entire thrust of these decisions; it also finds no support in the passages of those decisions cited by Santa Fe.

In *Virginian Ry.*, the Court stated that the RLA did not "preclud[e] such individual contracts as petitioner may elect to make directly with individual employees" (300 U.S. at 549), however, that statement was directed to the carrier's objection that it was being prohibited from entering into "contracts of employment" with individual employees. *Id.* at 548. The Court stated that the statute did not prohibit bargaining with individuals when *no* bargaining agent has been designated, and that a carrier would not be compelled to enter into any hiring agreement and could enter into individual contracts of hiring.[1]

In *J.I. Case* the Court held that individual contracts are "subsidiary to the terms of the trade agreement" and an individual employee may not "waive any of its benefits", even if on his own he would yield to less favorable terms." 321 U.S. at 336. In *J.I. Case*, the Court did state that an employee could enter into an agreement which is not inconsistent with the collective bargaining

[1] The passage of the decision cited by Santa Fe is in the Court's discussion of part of the United States' brief stating the position ultimately adopted by the court. (300 U.S. at 548-49). *See also NLRB v Jones & Laughlin*, 301 U.S. 1, 45 (1936), and *J.I. Case: Virginian Ry.* and *NLRB v. Jones & Laughlin* recognized "some scope for individual contracts but it did not undertake to define it or consider the relations between lawful individual and collective agreements, which is the problem before us now." 321 U.S. at 336.

agreement (*Id.* at 339), but that immediately followed the Court's statement that individual contracts may deal with matters not "within the stautory scope of collective bargaining." *Id.* Obviously, the Court's recognition of the ability of employers and individual employees to bargain over matters which are not subject to collective bargaining does not mean that direct dealing with individual employees over *bargainable matters* is permissible.[2]

In *Order of Railroad Telegraphers*, the Court did sustain an arbitration award which held that employees were entitled to a collectively bargained rate of pay rather than their individually bargained rate of pay. However, *Order of Railroad Telegraphers* concerned two issues: the contractual rights of the individual employees, and the statutory obligations of the employer. The Court held that the individuals were entitled to the collectively bargained rate of pay *and* that the employer's conduct violated the RLA. 321 U.S. at 346-348. The fact that individuals can enforce their collectively bargained rights through arbitration despite an unlawful individual contract does not mean that they, all of their co-workers and their Union can, or must, seek enforcement of the statutory prohibition against direct dealing in arbitration. Indeed, the Court specifically recognized the distinct nature of the two aspects of the direct dealing problem in its decision in *Order of Railroad Telegraphers*.

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[2] Santa Fe's reliance on *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) is similarly unavailing. Although the Court observed that "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by the collective bargaining agreement" (482 U.S. at 396), the contracts at issue there were negotiated by employees when they were managers not covered by the collective agreement. Moreover, the Court held only that the NLRA did not convert an action on those contracts into a Federal cause of action; and it specifically noted that the employer could still assert in state court that the individual agreements were invalid under the NLRA.

Any doubt as to the scope of the prohibition against direct dealing was resolved in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), in which the Court stated: "[b]argaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained. . . ." *Id.* at 684. Furthermore the Court stated that the employer in *Medo Photo* was not relieved of its obligations to negotiate only with the union, even when its employees asked that those obligations be disregarded, because "[t]he statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer even though the employees consent." *Id.* at 687. *See also Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990).

Accordingly, under well-established precedent of this Court, the Unions' complaint clearly asserted a claim within the jurisdiction of the district court to enforce the RLA.

II. SANTA FE'S ASSERTION OF A CONTRACTUAL WAIVER OF THE PROHIBITION AGAINST DIRECT DEALING DID NOT DIVEST THE DISTRICT COURT OF JURISDICTION OF THE UNIONS' COMPLAINT

A. *Conrail* Does Not Support The Court of Appeals' Conclusion That Santa Fe's Contract Claim Required Arbitration of the Unions' Complaint

Conrail does not control this case, nor does it support the court of appeals' decision, because this case presents a question left unanswered in *Conrail*: What is the effect of a carrier's asserted contractual defense to an RLA complaint when a union denies the existence of the alleged contract? 105 L.Ed 2d at 267.n.9.

In *Conrail*, both parties recognized the existence of an implied agreement concerning return-to-duty physical

examinations of employees. The unions asserted that Conrail "departed materially from the parties agreement" in adding urinalysis drug testing to the physical examinations, so Conrail's actions constituted a change in working conditions without prior bargaining; Conrail argued that the agreement regarding physical examinations arguably permitted its actions so the dispute was over contract interpretation and therefore subject to arbitration. *Id.* 267-70. Because the Court concluded that "the parties agreed that Conrail's power to conduct physical examinations is an implied contractual term," it stated that although "the parties take different views of how a court is to determine whether a past practice has risen to the level of an implied contractual term," it did not have to decide that question. 105 L. Ed. 2d at 267 n.9.

This case differs significantly from *Conrail* because here the Unions have strenuously denied the existence of *any* agreement waiving the prohibition against direct dealing. The question presented by Santa Fe's claim of contractual waiver is not whether an existing agreement can be interpreted as permitting Santa Fe's actions, but rather whether the alleged agreement even exists. The Unions submit that such questions must be resolved by courts, not by arbitrators; *Conrail*, therefore does not support the conclusion that Santa Fe's claim of waiver divested the district court of jurisdiction of the Unions' complaint. Indeed, this Court's discussion of the differences between the Unions and Conrail as to "how a *court* is to determine whether a particular past practice has risen to the level of an implied contractual term" (*id.*, emphasis added), indicates that when the parties dispute whether a contract exists, that question is to be resolved by the district court, not an arbitrator.[3]

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[3] This result is consistent with NLRA precedent that it is proper for the NLRB to construe a contract in an unfair labor practice case, even when the parties' dispute involves different interpretations of the contract. *NLRB v. C&C Plywood Co.*, 385 U.S. 421,

A second significant difference between this case and *Conrail* is that this case concerns a fundamental command of the statute which is necessary to its effective operation. As the Court of Appeals for the District of Columbia Circuit has observed, in a case under the NLRA, an agreement permitting direct dealing "would substantially modif[y] the collective-bargaining system provided for in the statute by weakening the independence of the 'representative chosen by the employees,'" *Toledo Typographical Union, supra,* 907 F.2d at 1224 (citation omitted). Moreover, that court stated (*id.*) that direct dealing over employee buyouts:

> is particularly offensive to the principle of collective bargaining because it would put the Employer in a position to exert a highly divisive force among the members of the bargaining unit. By negotiating directly with employees in an attempt to buy out some number of lifetime job guarantees at the lowest cost, the Employer could effectively put the employees into competition with each other to sell out at the lowest price.

B. Santa Fe Has Not Refuted The Unions' Assertion That The Court Of Appeals' Decision Conflicts With Precedent Of This Court Concerning Waivers Of Statutory Rights

Santa Fe has attempted to refute the Unions' reliance upon this Court's decisions in *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1955), *NLRB v. Magnavox Co.,* 415 U.S. 322 (1974) and *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983), by asserting that the instant case involves "simply a relinquishment of the right to bargain over a particular economic subject matter which *Magnavox* and *Metropolitan Edison* establish was within the Unions' power to do." Brief in Opposition at

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428 (1967), *NLRB v. Great Dane Trailers Inc.,* 388 U.S. 26, 31 n.7 (1967). *See also NLRB v. Plasterers Union No. 79,* 404 U.S. 116, 136-37 (1971).

17-18. However, this case does not concern merely an economic term of employment, but rather the fundamental right of employees to engage in collective bargaining. Santa Fe's contention is not merely that the Unions waived bargaining over the terms of employee resignations, but that the Unions recognized that there would be bargaining over such terms and agreed that employees would have to engage in such bargaining individually; a result directly contrary to the entire purpose of the statute.

Moreover, Santa Fe has ignored this Court's recognition in *Magnavox* (415 U.S. at 325-26), that representation rights inhere in individual employees and are so fundamental to operation of the Act that they may not be waived. In this case, the Cleburne shop employees were entitled to enforcement of their statutorily protected decision to consolidate their bargaining power and to avoid the destructive competiveness of individual bargaining (*J.I. Case*, 321 U.S. at 336, *Toledo Typographical Union*, 907 F.2d at 1224). When the statutory right at issue here is properly perceived, it is apparent that this case resembles the situation in *Magnavox* where it was held that the right to distribute union literature was essential to the right of self-organization and selection of a bargaining representative and that it was not subject to waiver. 415 U.S. at 325-26. Additionally, although Santa Fe has attempted (Brief in Opposition at 18 n.8) to distinguish this case on its facts from *American Ry. & Airway Supervisors Ass'n*, 891 F.2d 675 (8th Cir. 1989), *petition for cert. filed*, (No. 89-1435), Santa Fe has not explained why a rail carrier's rights under Section 2 Third cannot be waived (*id.* at 679), but employee rights under Section 2 Third may be waived.[4]

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[4] Santa Fe has also failed to address the Unions' argument (Petition at 16-17) that such rights may not be waived under the RLA since Section 2 Eighth (45 U.S.C. § 152 Eighth) incorporates those rights in all RLA agreements.

Even if the prohibition against direct dealing may be waived, Santa Fe has not demonstrated that the "clear and unmistakable waiver" test should not apply. Santa Fe asserts that this NLRA doctrine is inapplicable because the RLA requires arbitration of merely arguable contract claims (Brief in Opposition at 19, citing *Conrail*), but *Conrail* did not consider the clear and unmistakable waiver test. Furthermore, NLRA precedent has similarly developed an equally strong requirement of arbitration of contract interpretation disputes. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-78 (1960); *A.T. & T. Technologies v. Communications Workers of America*, 475 U.S. 643, 649-50 (1986). Moreover, when the NLRB does defer to arbitration when a contractual defense is asserted in an unfair labor practice case, it retains jurisdiction and will consider the issue *de novo* if the award is inconsistent with the statute. *NLRB v. Plasterer's Union No. 79*, 404 U.S. 116, 136-37 (1971); *United Technologies Corp.*, 268 NLRB No. 83 (1984).[5]

C. Santa Fe Has Not Demonstrated That The Fifth Circuit Properly Affirmed The District Court's Dismissal Of The Unions' Complaint

Santa Fe has asserted that the *Conrail* decision did not require that the district court just defer the contract claim to arbitration and retain jurisdiction of the Unions' complaint, because in *Conrail*, this Court "did not reverse and remand with instructions for the lower

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[5] Santa Fe's reliance upon the NLRB's decisions in *Radioear Corp.*, 199 NLRB 1161 (1972) and *Jos. Schlitz Brewing Co.*, 175 NLRB 141 (1969) (Brief in Opposition at 20 n.9), is unavailing because both of those cases involved allegations of unilateral changes in working conditions, not violations of basic representation rights. And the *Radioear* decision was criticized by the D.C. Circuit in a similar case because the Board did not apply the clear and unmistakable waiver test. *Road Sprinkler Fitters v. NLRB*, 600 F.2d 918, 922-23 (D.C. Cir. 1979); *Road Sprinkler Fitters v. NLRB*, 676 F.2d 826, 829, 833 (D.C. Cir. 1982).

court to stay proceedings during the pendency of arbitration." Brief in Opposition at 22.[6] However, the absence of such an order does not undercut the clear holding that a district court should "defer" to arbitration and that the other statutory processes of the Act would be "delayed". 105 L. Ed. 2d at 266. Moreover, in that case, the Court assumed that if the Unions prevailed in arbitration, any injuries to employees could be remedied by an arbitral back pay order, and that the possibility of additional back pay orders as well as collective bargaining, could address prospective problems. 105 L. Ed. 2d at 266 n.8

In the instant case, adjudication of the statutory rights involved would require a determination of whether Santa Fe violated the prohibition against direct dealing and, if a violation was found, issuance of an order enjoining such violations in the future. If Santa Fe's claim was placed before an arbitrator, who rejected Santa Fe's interpretation of the alleged contract, the arbitrator might provide back pay to individual employees. However, the arbitrator could not decide the statutory issues, or fully remedy the statutory violation, nor could he provide the appropriate statutory relief, including injunctive relief. *C & C Plywood*, 385 U.S. at 429 n.15. In that event, the failure of the district court to retain jurisdiction would mean that the Unions would have no ability to vindicate the statutory rights of Santa Fe's employees.

Santa Fe's attempt to distinguish *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 568 (1946), because

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[6] Santa Fe's contention that the Unions' deferral argument is not properly before the Court because it was not raised until the Unions filed their reply brief in the court of appeals (Brief in Opposition at 21) is without force. The deferral argument was based upon this Court's decision in *Conrail* which was issued just four days before the Unions filed their reply brief. However, under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), once this Court issued its decision, the court below was required to retain jurisdiction pending arbitration.

that case involved the district court's bankruptcy jurisdiction as well as its RLA jurisdiction (Brief in Opposition at 22), is unavailing. The Court concluded that resolution of the RLA issue required the interpretation of a collective bargaining agreement, so the district court should have *stayed* the dismissal of the complaint pending the results of arbitration. 326 U.S. at 567-68. Thus, the Court's discussion of the stay of district court proceedings pending arbitration was in its holding regarding the district court's RLA jurisdiction, not its bankruptcy jurisdiction.

Accordingly, even if Santa Fe's claim of contractual waiver required arbitration, dismissal of the Unions' complaint was contrary to this Court's decisions in *Conrail* and *Pitney*.

CONCLUSION

The Court should grant the writ sought by petitioners and review and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN *
DONALD F. GRIFFIN

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 - 17th Street, N.W., Suite 210
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners

* Counsel of Record

Date: September 18, 1990